

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

KITSAP ALLIANCE OF PROPERTY  
OWNERS,

Petitioner,

v.

KITSAP COUNTY,

Respondent,

and

JERRY HARLESS,

Intervenor.

**Case No. 16-3-0016**

**FINAL DECISION AND ORDER**

**SYNOPSIS**

*Petitioner, Kitsap Alliance of Property Owners (KAPO), challenged Kitsap County (County) Ordinance No. 538-2016, amending the county code by adopting Reasonable Measures designed to reduce inconsistency between growth and development assumptions, targets, and objectives in the County's comprehensive plan goals and policies and the actual growth and development that occurred in the County between 2009 and 2014. The Board concluded KAPO did not carry its burden to prove the County's action failed to comply with the goals and requirements of the Growth Management Act (GMA) pertaining to public participation and notice, consideration of local circumstances, and protection of property rights.*

## I. INTRODUCTION

The challenged action is Kitsap County Ordinance No. 538-2016, published September 6, 2016, amending the county code regarding Reasonable Measures. The Board designated the following as core documents:

- **Resolution No. 169-2016** concerning “The Board of County Commissioners’ Commitment Regarding Further Assessment & Consideration of Additional Reasonable Measures.”;
- Draft Supplemental Environmental Impact Statement (DSEIS), November 2015 – (2 volumes each);
- Final Supplemental Environmental Impact Statement (FSEIS), April 2016 – (1 volume).

Procedural matters relevant to the case are detailed in Appendix A.

Legal issues relevant to the case are detailed in Appendix B.

## II. BURDEN OF PROOF AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption. This presumption creates a high threshold for challengers as the burden is on the petitioner to demonstrate that any action taken by the County is not in compliance with the GMA.

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.<sup>1</sup> The scope of the Board’s review is limited to determining whether a County has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.<sup>2</sup> The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA. The Board shall find compliance unless it determines that the County’s action is clearly erroneous in view of the entire record before

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<sup>1</sup> RCW 36.70A.280, RCW 36.70A.302.

<sup>2</sup> RCW 36.70A.290(1).

1 the Board and in light of the goals and requirements of the GMA.<sup>3</sup> In order to find the  
2 County's action clearly erroneous, the Board must be "left with the firm and definite  
3 conviction that a mistake has been made."<sup>4</sup>

### 5 **III. BOARD JURISDICTION**

6 The Board finds the Petition for Review was timely filed, pursuant to RCW  
7 36.70A.290 (2). The Board finds KAPO has standing to appear before the Board, pursuant  
8 to RCW 36.70A.280(2)(b). KAPO stipulated to the Board's lack of jurisdiction over questions  
9 of constitutional law presented in issues 8-14.<sup>5</sup> The Board finds it has jurisdiction over the  
10 remaining subject matter of the petition pursuant to RCW 36.70A.280(1).

### 12 **IV. ANALYSIS AND DISCUSSION**

#### 14 **Background**

15 RCW 36.70A.215 requires that certain counties, in consultation with cities, adopt  
16 countywide planning policies (CWPPs) which establish a review and evaluation program.  
17 That program is then to be used to ascertain whether the county and its cities are actually  
18 achieving urban growth area (UGA) densities as contemplated by the CWPPs and the  
19 comprehensive plans of the county and its cities. The program also must identify reasonable  
20 measures to reduce inconsistencies which have been identified by the review and  
21 evaluation program. Kitsap County's 2014 Buildable Lands Report (BLR) demonstrated  
22 such inconsistencies in the growth that occurred in the County between 2009 and 2014. In  
23 *Harless IV*, the Board found, *inter alia*, that the County's 2014 BLR, adopted on June 30,  
24 2015, had demonstrated inconsistencies between its achieved urban/rural development  
25 split, residential densities, and adopted targets, and that the County had once again failed to  
26 adopt any new reasonable measures designed to address the long-standing problem of  
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31 <sup>3</sup> RCW 36.70A.320(3).

32 <sup>4</sup> *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

<sup>5</sup> Petitioner's Restatement of Issues (November 30, 2016) at 2.

1 over-sized pre-GMA lots<sup>6</sup> and insufficient urban share of growth<sup>7</sup> as required by RCW  
2 36.70A.215. The Board remanded the BLR to the County to be brought into compliance in  
3 January, 2016.<sup>8</sup> Thereafter, the County *identified* new reasonable measures in Kitsap  
4 County Resolution 108-2016, adopted June 27, 2016.<sup>9</sup> Based, in part, on the new  
5 reasonable measures identified, the Board issued an order finding the County compliant  
6 with the GMA.<sup>10</sup> One of the reasonable measures identified in Resolution 108-2016 was a  
7 new Maximum Urban Lot Size requirement.<sup>11</sup>  
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9 Two months later, Ordinance 538-2016 was adopted<sup>12</sup> *enacting* the maximum lot size  
10 requirement within the UGAs for the purpose of achieving minimum urban density in Urban  
11 Low Residential (ULR) and Urban Cluster Residential (UCR) zones.<sup>13</sup> KAPO confines the  
12 basis of its challenge of Ordinance 538-2016 to issues pertaining to the maximum lot size  
13 requirement.<sup>14</sup>  
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## 15 Preface

16 KAPO makes numerous assertions regarding the County's **intent** in adopting  
17 Ordinance 538-2016, *inter alia*: (1) the Ordinance was merely enacted to "do something" to  
18 satisfy the Board and avoid appeals; (2) the County believed that the "risk" was sufficient to  
19 invoke privileged conversations; and (3) the County viewed the adoption date of June 30,  
20 2016, as a requirement.<sup>15</sup> Under RCW 36.70A.280 the Board has authority to determine  
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24 <sup>6</sup> See *Kitsap Co. v. GMHB*, 138 Wn. App. 863, 158 P.2d 638 (2007).

25 <sup>7</sup> *Harless v. Kitsap*, GMHB No. 15-3-0005 (FDO, January 22, 2016).

26 <sup>8</sup> *Id.*

27 <sup>9</sup> County Resolution 108-2016 was adopted on June 27, 2016, and amended the 2014 BLR with the addition of  
28 two appendices. Appendix E identified new, potential reasonable measures and Appendix F was a reasonable  
29 measures monitoring report.

30 <sup>10</sup> *Harless v. Kitsap*, GMHB No. 15-3-0005 (Order on Compliance, October 10, 2016).

31 <sup>11</sup> The Board takes official notice of Resolution 108-2016, Appendix E, p. 2, reasonable measure #12:  
32 Maximum Urban Lot Size.

<sup>12</sup> August 30, 2016.

<sup>13</sup> Ordinance 538-2016, Table 17.420.050(A) on p. 54 and 17.420.060 Footnotes for tables, fn A.4 on p. 63, fn.  
A.12. a and b on p. 64, fn. 25 on p. 65.

<sup>14</sup> KAPO Amended Brief at 1.

<sup>15</sup> See, e.g. KAPO Amended Brief at 2, 5.

1 whether certain municipal **actions** comply with the GMA and declines to consider  
2 allegations as to the County's intent.

#### 3 4 **GMA Notice and Public Participation Requirements**

- 5 1. Did the adoption process for the Reasonable Measures Ordinance violate GMA  
6 adequate notice and meaningful, early, and continuous participation requirements  
7 set out in RCW 36.70A.035, RCW 36.70A.140, and/or the County's adopted  
8 public participation plan and Countywide Planning Policy ("CWPP") Element B,  
9 Policy k?

10 KAPO acknowledges that it is not alleging that the County failed to comply with the  
11 form of the County's notice,<sup>16</sup> but rather alleges that (1) the County's staff held meetings  
12 with some stakeholders that were not open to the public;<sup>17</sup> (2) drafts of proposed reasonable  
13 measures were not available to the public until late April;<sup>18</sup> (3) there was "no evidence of  
14 public input prior to the public hearing;"<sup>19</sup> (4) no public comment was taken at work studies;  
15 <sup>20</sup> and (5) "proposals kept changing."<sup>21</sup>

16 KAPO devotes much briefing space and attaches numerous exhibits pertaining to the  
17 County's communication and meetings with other stakeholders, but then states that its  
18 appeal "has nothing to do with an assertion of "secret meetings."<sup>22</sup> Instead, KAPO alleges  
19 that "the process was under-inclusive, such that views and input of some members of the  
20 public were considered, while others were not" and asserts that "the Public Participation  
21 Plan obligated the County to affirmatively reach out to stakeholders" because KAPO had  
22 been "an active and visible player for years in the GMA Process."<sup>23</sup>  
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28 <sup>16</sup> KAPO Amended Brief at 7.

29 <sup>17</sup> KAPO Amended Brief at 8.

30 <sup>18</sup> KAPO Amended Brief at 5, 8.

31 <sup>19</sup> 7392: KAPO Letter to Commissioners (August 8, 2016) at 1.

32 <sup>20</sup> KAPO Amended Brief at 10.

<sup>21</sup> KAPO Amended Brief at 8.

<sup>22</sup> KAPO Reply at 4.

<sup>23</sup> KAPO Reply at 9-10.

1 Although the County did not formally identify new reasonable measures when it  
2 adopted its BLR in June 2016, it now explains that it had begun its evaluation of reasonable  
3 measures in a Draft Supplemental Environmental Impact Statement (Draft SEIS) that was  
4 available for public comment in November 2015.<sup>24</sup> The Draft SEIS contained an appendix  
5 (148-pages) evaluating past and proposed reasonable measures<sup>25</sup> wherein the maximum  
6 lot size proposal is identified.<sup>26</sup> A 30-day comment period was held on the Draft SEIS,  
7 followed by public hearings in February 2016 on alternatives and staff recommendations  
8 and a Comprehensive Plan Open House on April 15, 2016.<sup>27</sup> Three emails and eight letters  
9 were received from William Palmer,<sup>28</sup> two of them signed in his capacity as President of  
10 KAPO,<sup>29</sup> expressing concerns about various zoning changes, policy changes, and the public  
11 comment opportunities related to the 2016 Comprehensive Plan Update. None of those  
12 communications referenced the proposed reasonable measures.<sup>30</sup>

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14  
15 On April 26, 2016, the County issued a white paper with a draft list of reasonable  
16 measures, including the maximum lot size regulation.<sup>31</sup> On May 7, 2016, the Kitsap Builders  
17 Association (KBA) sent an email to the Kitsap County Board of County Commissioners  
18 (BoCC) requesting an extension of the County's deadline to adopt reasonable measures.<sup>32</sup>  
19 Following a May 10, 2016, public hearing on the draft reasonable measures, KBA hosted a  
20 meeting attended by Mr. Harless, the Suquamish Tribe and others – but no County staff  
21 attended.<sup>33</sup> As previously noted, on June 27, 2016, the BoCC adopted Resolution 108-  
22 2016, amending the 2014 BLR to add Appendix E, *identifying* new potential reasonable  
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<sup>24</sup> Response Brief at 3.

<sup>25</sup> Core Document: Draft SEIS, Appendix G (November 2015).

<sup>26</sup> *Id.*, p. 70.

<sup>27</sup> Core Document: Response to William Palmer, Final SEIS, Chapter 6 (April 2016) p. 6-53 - 6-55.

<sup>28</sup> Core Document: Final SEIS (April 2016) p. 6-25.

<sup>29</sup> Response Brief at 3; Core Document: Correspondence from William Palmer (emails 75-77, letter 78), Final SEIS, Chapter 6 (April 2016).

<sup>30</sup> *Id.* The Final SEIS included a summary of 103 public comments, including copies of comment letters, with staff responses and was published in April 29, 2016. *Id.*; Respondent's Brief at 4.

<sup>31</sup> Response Brief at 4; Exhibit 7461: Reasonable Measures (April 26, 2016) p. 2.

<sup>32</sup> Exhibit 7401: Letter from KBA, p. 1.

<sup>33</sup> Declaration of Jerry Harless (January 21, 2017) at 2.

1 measures including a maximum lot size to address urban density and urban share of  
2 growth.<sup>34</sup> This action was taken to comply with the Board's remand in the prior case.<sup>35</sup>

3 Three days later, the County adopted Ordinance 534-2016,<sup>36</sup> updating the County's  
4 Comprehensive Plan, but held the *enactment* of a maximum lot size regulation over so that  
5 the public participation process could be extended.<sup>37</sup> The Planning Commission held work  
6 study sessions on July 5 and July 19, 2016.<sup>38</sup> A legally-noticed public hearing was held by  
7 the BoCC on August 8, 2016, where public testimony was taken and the record was held  
8 open for public comment through August 24, 2016.<sup>39</sup> A final public hearing was held on  
9 August 31, 2016, at the conclusion of which the BoCC deliberated and adopted Ordinance  
10 538-2016, enacting reasonable measures,<sup>40</sup> and Resolution 169-2016, declaring the  
11 BoCC's commitment to further assessment and consideration of additional reasonable  
12 measures.<sup>41</sup>

## 13 Discussion

14  
15 KAPO's briefing does not address the County's adopted public participation plan or  
16 Countywide Planning Policy ("CWPP") Element B, Policy k. Pursuant to WAC 242-03-  
17 590(1), **the Board finds and concludes** that aspect of Issue 1 must be deemed  
18 abandoned.<sup>42</sup>

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23 <sup>34</sup> *Harless v. Kitsap*, GMHB No. 15-3-0005 (Order on Compliance, October 10, 2016) at 1. Pursuant to WAC  
24 242-03-630(4), the Board takes official notice that Appendix E to Resolution 108-2016 adopted on June 27,  
25 2016. Item 12 identified imposition of a maximum lot size as a reasonable measure.

26 <sup>35</sup> See, *Harless v. Kitsap*, GMHB No. 15-3-0005 (Order on Compliance, October 10, 2016).

27 <sup>36</sup> Ordinance 534-2016 was adopted on June 30, 2016.

28 <sup>37</sup> Response Brief at 4; Exhibit 7610: Email attaching Reasonable Measures Calendar of Events (July 28,  
29 2016).

30 <sup>38</sup> Response Brief at 5; Exhibit 7460: Planning Commission Agenda; Exhibit 7443: Code Update Timeline.

31 <sup>39</sup> *Id.*

32 <sup>40</sup> *Id.*

<sup>41</sup> Core Document: Resolution No 169-2016, which provides I pertinent part:

The Kitsap County [BoCC] resolves to develop a work plan by October 31, 2016 to further explore  
and adopt reasonable measures ....

<sup>42</sup> WAC 242-03-590(1) provides in pertinent part:

Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.

1 KAPO provides no argument or evidence that its allegations of private meetings with  
2 stakeholders;<sup>43</sup> draft proposals not being available until late;<sup>44</sup> a lack of public input prior to  
3 the public hearing;<sup>45</sup> and a lack of public comment at work studies amount to violations of  
4 the GMA. KAPO cites *Lewis v. City of Edgewood*<sup>46</sup> and other board cases for the  
5 proposition that changing proposals minimized opportunity for public review. Based on  
6 these perceived inadequacies, KAPO concludes that citizens were not fully advised of the  
7 proposed action or provided meaningful time and ability to comment.  
8

9 KAPO references numerous exhibits for its proposition that “proposals kept  
10 changing,” but a review of those exhibits demonstrates that the maximum lot size proposal  
11 was consistently present.<sup>47</sup> Indeed, it appears substantially the same since it was first  
12 identified in the Draft SEIS made available for public comment in November of 2015. RCW  
13 36.70A.035(2)(a)<sup>48</sup> provides that a city or county council must provide an additional  
14 opportunity for public review and comment if it chooses to consider a change to an  
15 amendment to its comprehensive plan or development regulations after the opportunity for  
16 review and comment has passed. However, an additional public hearing is not required if  
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21 <sup>43</sup> KAPO Amended Brief at 8.

22 <sup>44</sup> KAPO Amended Brief at 5, 8.

23 <sup>45</sup> 7392: KAPO Letter to Commissioners (August 8, 2016) at 1.

24 <sup>46</sup> In *Lewis*, the Board found that the City had not provided the public with sufficient opportunity to review and  
comment on substantial, last-minute amendments. *Lewis v. City of Edgewood*, GMHB No. 01-3-0020 (FDO,  
February 2, 2002) at 8-10.

25 <sup>47</sup> See, e.g. Exhibits Nos. 7097, 7097, 7115, 7141, 7253, 7253, 7313, 7315, 7333, 7364, 7437, 7438, 7475,  
7476, 7479, 7480, 7554: Draft Proposals.

26 <sup>48</sup> **RCW 36.70A.035 reads in pertinent part:**

27 (2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city  
28 chooses to consider a change to an amendment to a comprehensive plan or development regulation,  
and the change is proposed after the opportunity for review and comment has passed under the  
29 county's or city's procedures, an opportunity for review and comment on the proposed change shall  
be provided before the local legislative body votes on the proposed change.

30 (b) **An additional opportunity for public review and comment is not required** under (a) of this  
subsection if:

31 \*\*\*

32 (ii) The **proposed change is within the scope of the alternatives available for public comment**;  
Emphasis added.



1 “the proposed change is within the scope of the alternatives available for public comment,”  
2 RCW 36.70A.035(2)(b)(ii).<sup>49</sup>

3 In sum, KAPO does not dispute that the County met the notice requirements.  
4 Importantly, KAPO has provided no evidence that the maximum lot size proposal changed  
5 after the public hearings held in the summer of 2016 to trigger the requirement that an  
6 additional public hearing be held.<sup>50</sup>

7  
8 **The Board finds and concludes** that KAPO has not satisfied its burden to adduce  
9 facts demonstrating that the County failed to comply with the public process requirements of  
10 RCW 36.70A.035 or RCW 36.70A.140.

11  
12 **Predisposition / Bias**

- 13 2. Did Kitsap County engage in predisposition or undue bias when adopting the  
14 Reasonable Measures Ordinance, in particular, giving undue consideration and  
15 influence to certain citizens challenging the County’s Buildable Lands Analysis  
16 Report in CPSGMHB Case No. 15-3-0005, thereby violating RCW 36.70A.035,  
17 RCW 36.70A.140, and/or the County’s adopted public participation plan and  
Countywide Planning Policy (“CWPP”) Element B, Policy k?<sup>51</sup>

18 KAPO did not brief its allegation that Ordinance 538-2016 was adopted in violation of  
19 CWPP Element B, Policy k. That allegation is deemed abandoned.

20  
21 As evidence of bias, KAPO first asserts its belief that the County met with  
22 stakeholders prior to the first noticed public hearing on the proposal.<sup>52</sup> Then, on reply,  
23 KAPO states that it is *not* complaining about County discussions with discrete  
24 stakeholders.<sup>53</sup> On reply and at the hearing on the merits (HOM), KAPO first denied that it  
25 expected personal notice and/or individual meetings with staff,<sup>54</sup> but then complained that  
26 the “tri-party group” (Harless, KBA and the Suquamish Tribe) “got private access and  
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29 <sup>49</sup> *PRISM v. City of Bainbridge Island (PRSM)*, GMHB No. 14-3-0012 (FDO, April 6, 2015) at 28-29.

30 <sup>50</sup> Representatives of KAPO attended these hearings and commented. Intervenor Brief at 9; KAPO Reply at 11.

31 <sup>51</sup> Case reference corrected per *ERRATA* to Restatement of Issues filed February 9, 2017.

32 <sup>52</sup> KAPO Amended Brief at 11.

<sup>53</sup> KAPO Reply at 9, Remarks of Mr. Reynolds at HOM.

<sup>54</sup> KAPO Reply at 10.

1 influence not enjoyed by KAPO or other members of the public.”<sup>55</sup> At the HOM, KAPO  
2 complained that the County was “obliged to seek out interested parties,” stating, “It is well-  
3 known to the County that KAPO is interested.” Board Member Roehl asked, “Did you seek  
4 to meet with the County? Were you denied?” and Mr. Reynolds replied, “No” to both  
5 questions.<sup>56</sup> Thus, KAPO’s own statements are contradictory.

6  
7 After the County issued its white paper containing the draft list of reasonable  
8 measures, including the maximum lot size regulation,<sup>57</sup> on April 26, 2016, the County  
9 received requests to extend the time for consideration of the proposed measures.<sup>58</sup>  
10 Intervenor Harless declares that the County did not convene meetings with discrete interest  
11 groups but rather responded to communications from these groups.<sup>59</sup> Following a May 10,  
12 2016, public hearing on the draft reasonable measures, the KBA hosted a meeting attended  
13 by Mr. Harless, the Suquamish Tribe and others – but no County staff attended.<sup>60</sup> In mid-  
14 June, KBA hosted a second meeting which was attended by County staff.<sup>61</sup> As described  
15 previously,<sup>62</sup> the County ultimately agreed to delay *enactment* of some reasonable  
16 measures, including the maximum lot size requirement, through the summer of 2016 in  
17 order to allow time for the additional public process required, should the draft of reasonable  
18 measures be revised.<sup>63</sup>

19  
20 KAPO repeats complaints, leveled in support of Issue 1, that the draft proposals were  
21 received “late in the process,”<sup>64</sup> but acknowledges that the County has adopted a  
22 participation plan<sup>65</sup> and does not dispute that it followed its plan. Representatives of KAPO  
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25 <sup>55</sup> KAPO Reply at 11.

26 <sup>56</sup> Response to Board questions at the HOM.

27 <sup>57</sup> Response Brief at 4; Exhibit 7461: Reasonable Measures (April 26, 2016) p. 2.

28 <sup>58</sup> Response Brief at 4; Exhibit 7401: Letter from KBA.

29 <sup>59</sup> Intervenor Brief at 8-9.

30 <sup>60</sup> Declaration of Jerry Harless (January 21, 2017) at 2 (Intervenor Harless denies knowledge of the content of  
31 the proposed reasonable measure prior to dissemination on April 21, 2016.)

32 <sup>61</sup> *Id.* at 3.

<sup>62</sup> See Discussion of Issue 1.

<sup>63</sup> Declaration of Jerry Harless at 3-4.

<sup>64</sup> KAPO Amended Brief at 12.

<sup>65</sup> KAPO Amended Brief at 11, citing Resolution No. 106-2014.

1 were present and testified at the public hearings held in the summer of 2016.<sup>66</sup> KAPO has  
2 not explained how the Ordinance constitutes “illegal predisposition and undue bias” in  
3 violation of the public participation requirements in RCW 36.70A.035 and the requirement  
4 that the County adopt a public participation plan in RCW 36.70A.140. In fact, the County’s  
5 extension of the public process appears to have been expressly calculated to allow for  
6 public participation in anticipation of the possibility that proposals might be revised.  
7

8 **The Board finds** that KAPO has not provided evidence that the County failed to  
9 encourage the involvement of citizens as required by the GMA.

10 **The Board concludes** that KAPO has not met its burden to prove that the County’s  
11 action was clearly erroneous in light of the requirements of RCW 36.70A.035 or RCW  
12 36.70A.140.  
13

#### 14 **GMA Update Standards**

- 15  
16 3. Did the County impermissibly adopt changes outside of the directives or  
17 requirements of RCW 36.70A.130(1)(a) and (3)(a) and (4)(b) and/or this Board that  
18 are not needed to ensure consistency with the GMA or meet new enactments to  
the GMA since the last Plan Update?

19  
20 KAPO alleges that the County “impermissibly bifurcated the process” – apparently  
21 referring to the County’s decision to delay final adoption of the new reasonable measures by  
22 adopting Resolution 108-2016, declaring its intent to adopt reasonable measures but  
23 allowing additional time for public process.<sup>67</sup> Respondent County and Intervenor Harless  
24 contend that the additional time was an example of the County working to respond to citizen  
25 concerns, including the KBA and the Suquamish Tribe.<sup>68</sup>  
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31 <sup>66</sup> Intervenor Brief at 9; KAPO Reply at 11.

32 <sup>67</sup> Response Brief at 16.

<sup>68</sup> Response Brief at 10; Intervenor Brief at 8.

1 Generally, KAPO's prehearing brief is devoid of any legal argument.<sup>69</sup> On reply,  
2 KAPO asserts that "bifurcation" precludes informed comment because the reasonable  
3 measure in Ordinance 534-2016 cannot be reviewed in isolation of all other governing  
4 provisions in the County<sup>70</sup> and cites RCW 36.70A.040 – but KAPO did not allege a violation  
5 of .040 in Issue 3.

6 KAPO's concerns about the public process were discussed under Issue 2.  
7  
8 Regarding Issue 3, **the Board finds** that KAPO failed to provide briefing on any of the  
9 statutory provisions alleged to have been violated in the issue statement.

10 **The Board concludes** that Issue 3 was abandoned.<sup>71</sup>

#### 11 **Improper Delegation of GMA Duties**

- 12  
13 4. Did Kitsap County impermissibly treat the polices of the Puget Sound Regional  
14 Council as binding performance standards when adopting the Reasonable  
15 Measures Ordinance, thereby failing to take into account local circumstances as  
16 prescribed by RCW 36.70A.040(3), RCW 36.70A.070, RCW 36.70A.110, and  
RCW 36.70A.130 and CWPP Element N.2?

17 Here KAPO alleges that the County impermissibly treated Vision 2040 as  
18 "prescriptive and binding". The Board does not reach the threshold question of whether  
19 treating certain Multicounty Planning Policies (MPPS) adopted by the County as binding  
20 violates any GMA provision.<sup>72</sup> KAPO's prehearing brief does not identify what policies the  
21 County allegedly treated as binding.<sup>73</sup> On reply, KAPO "stands on the arguments in its  
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25 <sup>69</sup> KAPO Amended Brief at 14.

26 <sup>70</sup> KAPO Reply at 11.

27 <sup>71</sup> See footnote 39.

28 <sup>72</sup> See, *King County v Central Puget Sound Bd.*, 138 Wn.2d 161, 175-176: In order to provide a "framework to  
29 ensure consistency" of adopted plans within a county, "directive policies" of the CPPs "must have a binding  
30 effect." RCW 36.70A.210(7) requires MPPs for the Central Puget Sound counties. The Commerce guidelines  
31 at WAC 365-196-305 state that MPPs "establish a common region-wide framework that ensures consistency  
32 among county and city comprehensive plans adopted pursuant to RCW 36.70A.070 and county-wide planning  
policies adopted pursuant to RCW 36.70A.210." See, e.g., *Friends of Pierce County v. Pierce Co*, GMHB No.  
12-3-0002c (FDO, July 9, 2012), at 9-12, 18; *Summit-Waller et al. v. Pierce County*, GMHB Nos. 15-3-0010c  
and 12-3-0002 (Order On Compliance, October 5, 2016) at 7-9.

<sup>73</sup> KAPO Amended Brief at 16.

1 Opening Brief<sup>74</sup> and cites page 17, which addresses KAPO's Issue 6. KAPO may have  
2 been referring to its complaint about Commissioner comments that the PSRC was  
3 "certifying" the County's proposals,<sup>75</sup> but nowhere does the brief explain what local  
4 circumstances were not taken into account nor how that was a result of VISION 2040.

5 **The Board finds** that the argument supporting Issue 4 in KAPO's Prehearing Brief is  
6 inadequate to identify the alleged violation or provide supporting evidence. **The Board**  
7 **concludes** that KAPO has abandoned Issue 4.  
8

9  
10 **Property Rights: Arbitrary or Discriminatory Action**

- 11 5. Does the Reasonable Measures Ordinance provision relating to lot aggregation  
12 (KCC § 17.420.060.A.4; 17.420.060.A.12.b) and minimum lot sizes (§  
13 17.420.620.A) create a "disparate-impact" on certain segments of the County's  
14 citizens, thereby creating an inconsistency with RCW 36.70A.020 which states in  
15 part: "The property rights of landowners shall be protected from arbitrary and  
16 discriminatory actions."?  
17  
18 6. Does the Reasonable Measures Ordinance fail to meet GMA obligations to  
19 protect private property rights within the meaning of RCW 36.70A 020(6), in  
20 particular, the requirement for lot aggregation and maximum lot size identified  
21 immediately above, Issue No. 6.5, for the Urban Low Residential ("ULR") and  
22 Urban Cluster Residential ("UCR") zones?

23 **RCW 36.70A.020(6)** Property rights. ... The property rights of landowners shall be protected  
24 from arbitrary and discriminatory actions.  
25

26 Petitioner KAPO withdrew its challenge to lot aggregation in its prehearing brief and  
27 confined its arguments to the reasonable measure dealing with maximum lot size.<sup>76</sup> KAPO  
28 then combined its briefing on Issues 5 and 6. The Board restates the remaining and  
29 consolidated issue as:

30 Whether adoption of a maximum lot size (KCC 17.420.620.A) for Urban Low  
31 Residential ("ULR") and Urban Cluster Residential ("UCR") zones violates the  
32

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31 <sup>74</sup> KAPO Reply at 12.

32 <sup>75</sup> KAPO Amended Brief at 15.

<sup>76</sup> KAPO Amended Brief at 16, fn14.

1 requirement in RCW 36.70A.020(6) that property rights of landowners shall  
2 be protected from arbitrary and discriminatory actions.

3 The Board has long held that it lacks jurisdiction to determine claims of  
4 unconstitutional action.<sup>77</sup> Thus, the Board may only address the GMA goal that local  
5 governments (1) *consider* the potential of unconstitutional takings before adopting a  
6 regulation or plan under the Act;<sup>78</sup> and (2) *be guided by* GMA's Goal 6, that the rights of  
7 property owners be protected from actions that are arbitrary and discriminatory.<sup>79</sup>

8 The State Supreme Court has emphasized that the RCW 36.70A.020 planning goals  
9 are set forth to guide cities and counties in developing and adopting comprehensive plans  
10 and development regulations, but the goals do not impose mandates not enumerated  
11 elsewhere in the Act.<sup>80</sup> Noting that the goals are not prioritized and are sometimes mutually  
12 competitive,<sup>81</sup> the Court recently declined to read directive verbs in RCW 36.70A.020, such  
13 as "enhance" and "protect," as substantive requirements for local governments.<sup>82</sup>  
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19  
20 <sup>77</sup> See *Summit Waller v. Pierce County*, GMHB Nos. 15-3-0010c and 12-3-0002 (Order on Compliance,  
21 October 6, 2016) at 16 (citing *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) [If a court lacks  
jurisdiction over a proceeding, it "may do nothing other than enter an order of dismissal"]).

22 <sup>78</sup> *Shulman v. City of Bellevue*, GMHB No. 95-3-0076 (FDO, May 13, 1996) at 10 (citing *Gutschmidt v. Mercer*  
*Island*, GMHB No. 92-3-0006 (Order on Prehearing Motions, December 31, 1992) at 10-13).

23 <sup>79</sup> RCW 36.70A.020(6).

24 <sup>80</sup> *Quadrant Corp.*, 154 Wn.2d 224, 246, 110 P.3d 1132, 2005 Wash. LEXIS 371 (Wash. 2005) (quoting *Settle*,  
Richard, SYMPOSIUM: REVISITING THE GROWTH MANAGEMENT ACT: Washington's Growth Management  
25 Revolution Goes to Court, 23 Seattle U. L. Rev. 5, at 11).

26 <sup>81</sup> *Id.*

27 <sup>82</sup> The Court explained:

28 Nothing in this plain language suggests that GMA goals impose substantive requirements on  
29 local governments. . . . We also considered the legislature's deliberate use of the terms "protect"  
30 and "enhance" throughout the GMA, finding that "[i]n several sections of the GMA, the legislature  
31 allows enhancement of natural conditions under the GMA without *requiring* enhancement." We  
32 have acknowledged that RCW 36.70A.020 lists the enhancement of water quality as a goal of  
the GMA, see *id.*, but have never held that local governments are bound by these goals in  
addition to the enumerated requirements of the Act. We adhere to that holding here—the GMA  
does not require counties to "enhance" water quality.

*Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn.2d 648, 689, 381 P.3d 1, 2016 Wash.  
LEXIS 1133 (Wash. 2016)(citing *Quadrant Corp.*, 154 Wn.2d at 246).

1 KAPO supports its allegation that the County was not guided by Goal 6 by asserting  
2 that the maximum lot size regulation is arbitrary and discriminatory. Thus the parties focus  
3 their briefs on the question of whether or not the maximum lot size regulation is arbitrary or  
4 discriminatory. In light of recent Court holdings, the Board finds that this is not the relevant  
5 analysis because RCW 36.70A.020(6) sets forth a guiding principle but cannot be read to  
6 impose a substantive requirement. In the instant case, KAPO has not alleged that the  
7 County violated a substantive requirement of the GMA. Further, the Record is clear that the  
8 County extended the discussion of a maximum lot size regulation in order to consider citizen  
9 concerns about the impact the Ordinance might have on development of property.  
10

11 **The Board finds and concludes** that KAPO has failed to prove that the County did  
12 not consider the guidance of RCW 36.70A.020(6) in adopting Ordinance 538-2016.  
13

#### 14 **GMA Update Standards**

- 15 7. Did the County impermissibly adopt changes outside of the directives or  
16 requirements of RCW 36.70A.130(1)(a) and (3)(a) and (4)(b) and/or this Board that  
17 are not needed to ensure consistency with the GMA or meet new enactments to  
18 the GMA since the last Plan Update?

19 KAPO withdrew this issue.<sup>83</sup>  
20

#### 21 **Constitutional Issues**

22 KAPO stipulates to the Board's lack of jurisdiction over the constitutional issues  
23 presented in Issues 8-14 without waiver of right to raise them on appeal.<sup>84</sup>  
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32 <sup>83</sup> KAPO Amended Brief at 24.

<sup>84</sup> Petitioner's Restatement of Issues (November 30, 2016) at 2.

1 **V. ORDER**

2 Based upon review of the Petition for Review, the briefs and exhibits submitted by the  
3 parties, the GMA, prior Board orders and case law, having considered the arguments of the  
4 parties, and having deliberated on the matter, the Board Orders:

- 5
- 6 • Petitioner KAPO failed to meet its burden to establish Ordinance 538-2016  
7 violates any requirements of the GMA.
  - 8 • Case No. 16-3-0015 is closed.
- 9

10 SO ORDERED this 24th day of April, 2017.

11  
12 \_\_\_\_\_  
Cheryl Pflug, Board Member

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14 \_\_\_\_\_  
Deb Eddy, Board Member

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16 \_\_\_\_\_  
William Roehl, Board Member

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19  
20 **Note: This is a final decision and order of the Growth Management Hearings Board**  
21 **issued pursuant to RCW 36.70A.300.<sup>85</sup>**  
22

23  
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28 \_\_\_\_\_  
29 <sup>85</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all  
30 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.  
31 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days  
32 as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be  
served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC  
242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the  
Growth Management Hearings Board is not authorized to provide legal advice.



## Appendix A: Procedural matters

On November 2, 2016, Kitsap Alliance of Property Owners (KAPO) filed a petition for review. The petition was assigned Case No. 16-3-0016.

A prehearing conference was held telephonically on November 29, 2016. Petitioner KAPO appeared through its counsel Dennis Reynolds. Respondent Kitsap County appeared through its attorneys Shelley Kneip and Laura Zippel.

On November 17, 2016, Jerry Harless filed a Motion to Intervene which was granted.<sup>86</sup>

On January 30, 2017, parties filed a Stipulation and Agreed Order to Strike and Amend Record and Allow Filing of Amended Opening Brief. The Board granted the request.<sup>87</sup>

The Briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Prehearing Brief of Petitioner Kitsap Alliance of Property Owners, January 26, 2017;
- Prehearing Brief of KAPO (Amended), January 31, 2017 (KAPO Amended Brief);
- Respondent Kitsap County's Prehearing Brief, February 21, 2017 (Response Brief);
- Intervenor Harless' Response Brief, February 21, 2017 (Intervenor Brief);
- Reply Brief, March 3, 2017 (KAPO Reply)

### Hearing on the Merits

The hearing on the merits was convened March 21, 2017.

The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions seeking to

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<sup>86</sup> Order Granting Jerry Harless Intervention (November 30, 2017).

<sup>87</sup> Order to Strike and Amend Record and Allow Filing of Amended Opening Brief (January 31, 2017).

1 thoroughly understand the history of the proceedings, the important facts in the case, and  
2 the legal arguments of the parties.  
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## Appendix B: Legal Issues

Per the Prehearing Order, legal Issues in this case were as follows:

### GMA Notice and Public Participation Requirements

1. Did the adoption process for the Reasonable Measures Ordinance violate GMA adequate notice and meaningful, early, and continuous participation requirements set out in RCW 36.70A.035, RCW 36.70A.140, and/or the County's adopted public participation plan and Countywide Planning Policy ("CWPP") Element B, Policy k?

### Predisposition / Bias

2. Did Kitsap County engage in predisposition or undue bias when adopting the Reasonable Measures Ordinance, in particular, giving undue consideration and influence to certain citizens challenging the County's Buildable Lands Analysis Report in CPSGMHB Case No. 15-3-0005, thereby violating RCW 36.70A.035, RCW 36.70A.140, and/or the County's adopted public participation plan and Countywide Planning Policy ("CWPP") Element B, Policy k?<sup>88</sup>

### GMA Update Standards

3. Did the County impermissibly adopt changes outside of the directives or requirements of RCW 36.70A.130(1)(a) and (3)(a) and (4)(b) and/or this Board that are not needed to ensure consistency with the GMA or meet new enactments to the GMA since the last Plan Update?

### Improper Delegation of GMA Duties

4. Did Kitsap County impermissibly treat the policies of the Puget Sound Regional Council as binding performance standards when adopting the Reasonable Measures Ordinance, thereby failing to take into account local circumstances as prescribed by RCW 36.70A.040(3), RCW 36.70A.070, RCW 36.70A.110, and RCW 36.70A.130 and CWPP Element N.2?

### Property Rights: Arbitrary or Discriminatory Action

5. Does the Reasonable Measures Ordinance provision relating to lot aggregation (KCC § 17.420.060.A.4; 17.420.060.A.12.b) and minimum lot sizes (§ 17.420.620.A) create a "disparate-impact" on certain segments of the County's citizens, thereby creating an inconsistency with RCW 36.70A.020 which states in

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<sup>88</sup> Case reference corrected per *ERRATA* to Restatement of Issues filed February 9, 2017.

part: "The property rights of landowners shall be protected from arbitrary and discriminatory actions."?

### **GMA Goal 6 (Property Rights).**

6. Does the Reasonable Measures Ordinance fail to meet GMA obligations to protect private property rights within the meaning of RCW 36.70A 020(6), in particular, the requirement for lot aggregation and maximum lot size identified immediately above, Issue No. 6.5, for the Urban Low Residential ("ULR") and Urban Cluster Residential ("UCR") zones?

### **Inconsistency of Development Regulations with Comprehensive Plan**

7. Are the provisions regarding lot aggregation and/or minimum lot sizes in the ULR and UCR zones adopted in the Reasonable Measures Ordinance inconsistent with Comprehensive Plan Land Use Goal 1, Land Use Goal 6, Land Use Strategy No. 4, and/or Housing Goal 2, in violation of RCW 36.70A.040(4)(d)?<sup>89</sup>

Petitioner stipulates to the Board's lack of jurisdiction over the constitutional issues presented in issues 8-14 without waiver of right to raise them on appeal.<sup>90</sup>

### **Constitutional Issues**

8. Whether one or more of the following sections of the Reasonable Measures Ordinance identified above, Issues Nos. 6.5-6.7, are unconstitutional under Article XI, Sec.11 of the Washington State Constitution because they are in conflict with the GMA, a general law of the State?
9. Whether sections of the Reasonable Measures Ordinance identified above, Issues Nos. 6.5-6.6, violate the Washington State Constitution and/or the United States

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<sup>89</sup> Petitioner's requested statement was as set more fully set forth below. However, the presiding officer declines to allow the addition of the vague statements referencing 47 and 49 pages, respectively, of the County Comprehensive plan, specifically: "Housing Element (Plan, p. 4-51)", Housing Guiding Directive (Plan, p. 4-53)(affordable and diverse housing) *after the PHC*.

As required by RCW 36.70A.040(4)(d), are one or more of the provisions of the Reasonable Measures Ordinance, (a) lot aggregation; (b) minimum lot sizes in the ULR and UCR zones, inconsistent with the Comprehensive Plan, specifically the Section entitled "Land Use Guiding Directives (Plan, p.1-11) requiring consistency with the Growth Management Act, Land Use Goal 1 (Plan, p.1-14), Land Use Goal 6 (Plan, p.1-18), Land Use Strategy No. 4 (Plan, p.1-28), Housing Element (Plan, p.4-50, 4-51), Housing Guiding Directives (Plan, p.4-53) (affordable and diverse housing), Housing Goal 2 (Plan, p.4-54)?

<sup>90</sup> Petitioner's Restatement of Issues (November 30, 2016) at 2.

1 Constitution substantive due process clause because they are unduly burdensome  
2 and because less burdensome, reasonable alternatives such as mitigation and  
3 mitigation sequencing are available?

4 10. Whether one of more of the adopted Reasonable Measures violate statutory and/or  
5 constitutional nexus and proportionality standards?

6 11. Whether sections of the Reasonable Measures Ordinance, Issues Nos. 6.5-6.6, fail  
7 constitutional tests for protection of property use and development because of the  
8 absence of a particularized determination that the regulation is reasonably  
9 necessary?

10 12. Whether the County has met its burden under heightened scrutiny constitutional  
11 standards to justify imposition of the Reasonable Measures identified above, Issues  
12 Nos. 6.5-6.6, set out in the Reasonable Measures Ordinance?

13 13. Whether the Reasonable Measures Ordinance gives undue discretion to the  
14 regulators thereby depriving citizens of adequate notice as to what the rules and  
15 regulations actually are?

16 14. Whether the County violated State or Federal constitutional procedural due process  
17 protections for one or more of the failures and oversights set out in Issues Nos. 6.1-  
18 6.2, above?